(2)

No. 01-1836

Supreme Court, U.S.
FILED
JUN 26 2002
CLERK

In The

Supreme Court of the United States

JOHNNY E. WALKER,

Petitioner,

v.

PROVIDENT LIFE & ACCIDENT CO.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

SUPPLEMENTAL BRIEF

JAMES MENDELSOHN
Attorney at Law
1117 22nd Street South
Birmingham, Alabama 35205
(205) 939-0000

Counsel of Record for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

7 pages

TABLE OF AUTHORITIES

Page

CASES

FMC Corp. v. Holliday, 498 U.S. 52 (1990) 1

Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989) 2

Fort Halifax Packing Co., Inc. v. Coyne, 107 S.Ct. 2211 (1987) 3

Hillsborough County v. Automated Medical Laboratories, Inc., 105 S.Ct. 2371 (1985) 4

Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990) 1

Massachusetts Mutual Life Insurance Co. v. Russell, 473 U.S. 134 (1985) 1, 4

Metropolitan Life Insurance Co. v. Taylor, 481 U.S. 58 (1987) 1

Pilot Life Ins. Co. v. Dedeaux, 107 S.Ct. 1549 (1987) ..... *passim*

Rice v. Santa Fe Elevator Corp., 67 S.Ct. 1147 (1947) 4

Rush Prudential HMO, Inc. v. Moran, 536 U.S. __ (June 20, 2002) ..... *passim*

STATUTES

ERISA § 502 (29 U.S.C. § 1132) ..... *passim*

ERISA saving clause, 29 U.S.C. § 1144(b)(2)(A) ..... *passim*

ERISA deemer clause, 29 U.S.C. § 1144(b)(2)(B) 3

SUPPLEMENTAL BRIEF OF PETITIONER

THE RECENT DECISION IN *RUSH PRUDENTIAL HMO v. MORAN* PROVIDES ADDITIONAL REASON FOR GRANTING THE WRIT.

ERISA § 502 "provides the exclusive vehicle for actions asserting a claim for benefits under health plans governed by ERISA." *Rush Prudential HMO, Inc. v. Moran,* 536 U.S. ___ (June 20, 2002) (Thomas, J., dissenting). Under *Pilot Life*[1] and the line of precedents discussed in *Moran*,[2] claims covered by § 502 are subject to federal remedies exclusively. *Moran,* slip op., pp.18-20. Hence, no state law may supplant the remedies provided in § 502.

In *Pilot Life,* in dictum, the Court extended ERISA exclusivity beyond claims covered by § 502. *Pilot Life* held that state law may not "supplant or supplement" ERISA remedies. *Pilot Life,* 481 U.S. at 56. Walker urges that the phrase "or supplement" is error, because it conflicts with the explicit intent of Congress, and hence with traditional pre-emption jurisprudence. Walker urges that the Court should not "turn [the] dictum into holding." *Moran,* slip op., p.21.

The current petition presents exactly that issue. Walker advocates the following rule of law:

---

[1] *Pilot Life Ins. Co. v. Dedeaux,* 107 S.Ct. 1549 (1987).

[2] *Ingersoll-Rand Co. v. McClendon,* 498 U.S. 133 (1990); *FMC Corp. v. Holliday,* 498 U.S. 52, 60 (1990); *Pilot Life, supra; Metropolitan Life Insurance Co. v. Taylor,* 481 U.S. 58 (1987); *Massachusetts Mutual Life Insurance Co. v. Russell,* 473 U.S. 134, 146-47 (1985).

Statement of law urged by petitioner Walker

> State law remedies may not supplant remedies available under § 502(a); however, State insurance regulation may supplement ERISA remedies, provided that claims for ERISA benefits are removable to federal court to be determined by a federal judge sitting as factfinder in accordance with federal common law and the burdens of proof set forth in *Firestone v. Bruch.*[3]

Where remedies are concerned, the exclusivity doctrine overrides the express terms of the saving clause. The dissent in *Moran* sets out the major reason why. The reason is "Congress' interest in creating a uniform federal law of employee benefits" which will "encourage the formation of employee benefit plans." *Moran, supra* (Thomas, J., dissenting). Under the facts and procedural posture of the current petition, this concern is entirely satisfied. There is no impediment to fulfilling both of the goals which are the intent of Congress; that is, the goal of uniformity and the goal expressed in the saving clause.

In the current case, Walker's claim for benefits asserted against the insurance company will be determined entirely in accordance with the uniform federal law of employee benefits. His claim for benefits is brought in federal court under ERISA § 502. If the Court were to grant the petition, it would be in order to restore traditional pre-emption jurisprudence while at the same time satisfying the exclusivity concerns expressed in *Moran.*

ERISA's purpose of uniformity applies to employers, not insurers. Congress' concern was that employers as

---

[3] *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101 (1989).

administrators "would not have to administer their plans differently in each state in which they had employees." *Fort Halifax Packing Co., Inc. v. Coyne,* 107 S.Ct. 2211, 2217 (1987) ("It is thus clear that ERISA's pre-emption provision was prompted by recognition that employers establishing and maintaining employee benefit plans are faced with the task of coordinating complex administrative activities."). The same concern does not apply to insurance companies, which are already subject to the varying rules of the fifty states. The respondent in the current case is an insurance company, subject to the insurance regulations of the State of Alabama.

Under the above statement of law urged by Walker, ERISA's "deemer clause" plays a significant part in the statutory framework. The deemer clause provides in relevant part that no employee benefit plan "shall be deemed to be an insurance company or other insurer . . . or to be engaged in the business of insurance . . . for purposes of any law of any State purporting to regulate insurance companies, insurance contracts. . . . " 29 U.S.C. § 1144(b)(2)(B). Hence, employers are excused from compliance with State regulations; insurance companies are not.

The most plausible interpretation of the deemer clause is that the States may continue to regulate insurers, but that the States would not acquire any jurisdiction to regulate employers in the area of benefits. The deemer clause would serve no purpose otherwise. ERISA thus permits a State to exact reasonable penalties from insurance companies subject to its regulation, but not from employers. It follows that a State may exact a penalty from an insurance company in the aftermath of a federal court ERISA judgment. An insurer which has been found

to have acted in an arbitrary and capricious fashion in denying a meritorious ERISA claim presented by one of the States' citizens may be subject to a regulatory penalty.

Neither the word "exclusive" nor any synonym appears in ERISA. The doctrine of exclusivity of remedies is a construction of the federal statute.[4] The Court's construction has not entirely cleared up potential interpretative complications in light of the saving clause, under which ERISA does not "exempt or relieve" insurance companies from State regulation. The sensible interpretation of the deemer clause proposed by Walker perhaps might alleviate some of the "unhelpful drafting of these antiphonal clauses." *Moran,* slip op., p.7.

---

[4] Consideration of pre-emption issues starts "with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 67 S.Ct. 1147, 1152 (1947). Field pre-emption is inferred by the courts only when Congress has regulated the area comprehensively or when the subject is peculiarly within the federal domain. *Hillsborough County v. Automated Medical Laboratories, Inc.*, 105 S.Ct. 2371 (1985) (applying field pre-emption either where Congress "left no room" for state regulation or where "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject"). ERISA contains no express or implied private right of action for extra-contractual damages. *Massachusetts Mutual Life Insurance Co. v. Russell,* 473 U.S. 134, 146-47 (1985). Therefore, it cannot be said that ERISA "left no room" for state regulation of aggravated or egregious violations.

CONCLUSION

ERISA does not "exempt or relieve" the respondent from being subject to the insurance regulations of the State of Alabama, so long as the regulations do not infringe on the exclusively federal turf carved out in ERISA § 502. State laws limited to the insurance industry providing extra-contractual damages are preserved. The Court should grant the petition, and restore traditional pre-emption jurisprudence by holding that the word "supplement" in the dictum in *Pilot Life* is not a correct statement of the law where a State insurance law applies to exact a penalty from an insurance company which has been found by a federal court to violate ERISA.

This Court should grant the writ and reverse the judgment below. Walker's cause of action under Alabama insurance law is not pre-empted.

Respectfully submitted,

JAMES MENDELSOHN
Attorney at Law
1117 22nd Street South
Birmingham, Alabama 35205
(205) 939-0000

Counsel of Record for Petitioner